

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES E. SIMON	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1980.	:	

Petitioner, James E. Simon, 219 Hartford Avenue, Buffalo, New York 14223, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1980 (File No. 801309).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York on March 24, 1988. Petitioner appeared by Robert P. Johnson, Esq. The Audit Division appeared by Williams F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether, during the year at issue, petitioner was a domiciliary of New York State who maintained a permanent place of abode in New York, spent more than 30 days in New York or did not maintain a permanent place of abode outside the State, and was thus taxable as a full-year resident individual.

FINDINGS OF FACT

1. Petitioner, James E. Simon, and his wife, Virginia A. Johnson, timely filed a 1980 New York State Income Tax Resident Return. On their return petitioner and his wife elected a filing status of "Married filing separately on one return".

2. On April 12, 1984, the Audit Division issued to petitioner, James E. Simon, a Notice of Deficiency for the year 1980 asserting \$1,878.99 in tax due, plus interest of \$676.75, for a total amount due of \$2,555.74.

3. As indicated in a Statement of Audit Changes issued to petitioner on April 2, 1984, the Audit Division's issuance of the aforementioned Notice of Deficiency was premised on its position that petitioner had a New York domicile during the year at issue and was therefore taxable as a full-year resident individual.

4. On his return petitioner reported as his total income \$25,776.00. He claimed a New York subtraction of \$26,428.00 as "Non NYS Income". He reported \$75.00 as his Total New

York Income.¹

5. Petitioner, a native of the Buffalo, New York area, moved from Buffalo to Miami, Florida on September 1, 1978. Prior to his move, petitioner had been employed at the State University of New York at Buffalo for about eight years, and he had completed work on his doctorate. The completion of work on his doctorate caused employment opportunities to arise for petitioner. One such opportunity arose at the University of Miami, and it was this opportunity which prompted petitioner's move to Florida in 1978. While in Florida, petitioner rented apartments located in Miami. From September 1, 1978 through August 31, 1979 he rented an apartment at West 82nd Street in Miami and from September 1, 1979 through August 31, 1981 he rented an apartment on North Kendall Drive in Miami. Petitioner borrowed furniture from the University of Miami to furnish his apartments.

6. During the period he maintained a residence in Florida, petitioner continued to maintain a home in Buffalo. He had owned this home, located at 219 Hartford Avenue in Buffalo, for about 25 years. Petitioner continued to pay property taxes on his home. Petitioner's wife and sons continued to reside at the Hartford Avenue home.

7. Petitioner was married during the period discussed herein, but was experiencing marital difficulties. Notwithstanding such difficulties, he continued to provide financial support to his wife and their two sons, then about 17 and 20 years old.

8. During the period he maintained an apartment in Florida, petitioner returned to his home in Buffalo during summers and holidays. His wife visited him in Florida on occasion and often stayed for a month or longer. One of his sons also visited him in Florida.

9. Petitioner obtained a Florida driver's license soon after he moved there. He also kept his New York driver's license for a long period of time following his move to Florida.

10. Petitioner subsequently moved to Scranton, Pennsylvania in September 1981 to take a job with the University of Scranton in that university's Department of Physical Therapy.

11. Petitioner spent the summer preceding his move to Scranton at his home in Buffalo.

12. Petitioner lived in Scranton until January 1988. While in Scranton he rented furnished apartments. During the time he lived in Scranton petitioner, as he had done while living in Florida, continued to maintain his home in Buffalo, continued to support his wife and sons, and continued to return home to Buffalo during holidays and summers.

13. In January 1988 petitioner moved back to his home at 219 Hartford Avenue, Buffalo, and once again took up residence with his wife. He returned to Buffalo following his acceptance

¹Given the apparently incorrect calculations on petitioner's return it should be noted that the Audit Division recomputed petitioner's New York income as follows:

Total New York income reported	\$ 75.00
Federal income not included	<u>25,701.00</u>
Total New York income corrected	\$25,776.00

of a job at D'Youville College in Buffalo. At hearing petitioner explained that "I'm getting pretty close to retirement. I thought I'd take on that job and then retire".

CONCLUSIONS OF LAW

A. During the year at issue Tax Law § 605(a)(1) defined, in relevant part, a "resident individual" for personal income tax purposes as an individual:

"(1) who is domiciled in this state, unless

(A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state."

B. 20 NYCRR 102.2(d)(2) provides that:

"A domicile once established continues until the person in question moves to a new location with a bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time."

C. The burden of proof is upon petitioner to show that the necessary intention to effect a change in domicile existed (Tax Law § 689[e]). "The test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it'. The evidence to establish the required intention to effect a change in domicile must be clear and convincing" (Bodfish v. Gallman, 50 AD2d 457; citations omitted).

D. "[T]o effect a change of domicile, there must be an actual change of residence, coupled with an intention to abandon the former domicile and to acquire another" (Aetna Natl. Bank v. Kramer, 142 App Div 444).

E. Petitioner has failed to show that he intended to abandon his New York domicile and to acquire another domicile either in Florida or Pennsylvania. Upon review of the facts established herein, it is apparent that petitioner's moves to Florida and Pennsylvania were not made with a "bona fide intention" of making either Florida or Pennsylvania his fixed and permanent home. In fact, Findings of Fact "5" through "13" compel a conclusion that petitioner had no intention to make either Florida or Pennsylvania his fixed and permanent home and that he maintained his permanent place of abode in Buffalo. Most significantly, petitioner continued to maintain his home in Buffalo and he made frequent and extended visits to his home while he lived in Florida and Pennsylvania. Also, he rented apartments while away from Buffalo, and did not buy any furniture. Finally, he ultimately returned to his home in Buffalo. The Audit Division therefore properly taxed petitioner as a full-year resident of New York State for the year 1980 pursuant to section 605(a)(1) of the Tax Law.

F. The petition of James E. Simon is denied, and the Notice of Deficiency, dated April 12, 1984 is sustained.

DATED: Albany, New York
August 19, 1988

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE